

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

JEFFERSON ELEMENTARY SCHOOL
DISTRICT,

Respondent.

OAH CASE No. N2007020614

**ORDER DENYING PETITIONER'S
STAY PUT MOTION**

On February 21, 2007, the Office of Administrative Hearings (OAH) received from attorney F. Richard Ruderman a Request for Due Process Hearing (Complaint) on behalf of (Student), naming the Jefferson Elementary School District (District) as Respondent.

The same day, Student filed a Stay Put Motion, which requested that the Pacific Child and Family Associates (PCFA) continue to provide Student with an Applied Behavioral Analysis (ABA) program pursuant to the last agreed upon and implemented Individualized Education Program (IEP) of May 15, 2006. On March 5, 2007, OAH received a timely response from attorney Shawn Olson Brown on behalf of the District. The District contends that Student's Motion must be denied because the District switched from Student's ABA provider because the District terminated its master contract with PCFA.

APPLICABLE LAW

Title 20 United States Code section 1415(j)¹ provides: "Except as provided in subsection (k)(4) [concerning student disciplinary proceedings], during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed."

¹ All statutory citations are to Title 20 United States Code, unless otherwise noted.

34 Code of Federal Regulations part 300.518(a) (2006) provides: “(a) Except as provided in . . . [the regulation concerning student disciplinary proceedings], during the pendency of any . . . proceeding regarding a [request for a due process hearing], unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement. [¶] (b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents must be placed in the public school until the completion of all proceedings.”

Education Code section 56505(d), provides: “. . . [D]uring the pendency of the hearing proceedings, including the actual state-level hearing, or judicial proceeding regarding a due process hearing, the pupil shall remain in his or her present placement, except as provided in . . . [the federal regulation concerning student disciplinary proceedings], unless the public agency and the parent or guardian agree otherwise. A pupil applying for initial admission to a public school shall, with the consent of his or her parent or guardian, be placed in the public school program until all proceedings have been completed. . .”

The stay put provision of the Individuals with Disabilities Education Act has been interpreted to function as an automatic statutory injunction against changing a child’s then-existing “educational placement” or “present placement,” pending the resolution of a dispute between the school district and the parents regarding the child’s educational program. (*Casey K. v. St. Anne Community High School District No. 302* (7th Cir. 1998) 400 F.3d 508, 511.) The federal act and its regulations do not provide a definition for “educational placement.” For purposes of stay put, a student’s “current educational placement” is typically the placement called for by the student’s IEP that has been implemented prior to the due process hearing request. (*Thomas v. Cincinnati Board of Education* (6th Cir. 1990) 918 F.2d 618, 625.) If due to “changing circumstances the status quo cannot always be exactly replicated for the purposes of stay put. . . . The stay-put provision entitles the student to receive a placement that, as closely as possible, replicates the placement that existed at the time the dispute arose, taking into account the changed circumstances.” (*Van Scoy v. San Luis Coastal Unified School District* (C.D. Cal. 2005) 353 F.Supp.2d 1083, 1086.)

DISCUSSION

Before Student filed the Due Process Complaint, Student’s last agreed and implemented IEP was the May 15, 2006 IEP. The May 15, 2006 IEP states that PCFA will provide Student’s ABA program on a trial basis from May 15, 2006, through July 2, 2006. Neither party provides an explanation why the District continued to fund Student’s ABA past July 2, 2006, or why the District did not convene an IEP meeting before or after Student entered kindergarten to discuss Student’s ABA program.² On December 12, 2006, the District informed Student’s Guardian that Student’s ABA program provider would switch to Consultants for Learning and Autism Support Services (CLASS) because the District

² According to the May 15, 2006, Student’s annual IEP meeting should have occurred on November 14, 2006.

terminated its master contract with PCFA. CLASS began to provide Student with ABA services on January 8, 2007. Student's Guardian did not object to the District's switch of ABA providers until January 11, 2007.

The District contends that Student's Stay Put Motion should be denied because PCFA no longer has a master contract to provide ABA services to any student within the District, and because the May 15, 2006 IEP does not designate who will provide Student's ABA program after July 3, 2006. The District's opposition brief contains a declaration from Brenda Smith, District's Director of Special Education, that the District terminated the master contract with PCFA, along with the other non-public agencies, for financial reasons.

Although the parties have not entered into a new IEP, Student's last agreed upon and implemented educational program is the continued provision of an ABA program based on the District's continuing to provide Student this program. Student's last agreed upon and implemented educational program changed when the District terminated PCFA's master contract and the District notified Student's Guardian and started to provide ABA services through CLASS. Student's Guardian did not object to the District switching the ABA to CLASS until after the District notified Student's Guardian of the change and implemented the change. Therefore, Student's last agreed upon and implemented educational program is the ABA program provided by CLASS.

ORDER

Petitioner's Stay Put Motion is denied.

Dated: March 12, 2007

PETER PAUL CASTILLO
Administrative Law Judge
Special Education Division
Office of Administrative Hearings